IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR HILLSBOROUGH COUNTY
CIVIL ACTION DIVISION

FLOYD J. KENYON, SR. and FLORENCE
KENYON, his wife,
Plaintiffs,

Case No. 00-5401
-vs- Division: "D"
R.J. REYNOLDS TOBACCO COMPANY, a
foreign corporation,

Defendants.
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TRANSCRIPT OF PROCEEDINGS

BEFORE: THE HONORABLE HERBERT BAUMANN
Circuit Judge
TAKEN AT: Courtroom Number 1
Hillsborough County Courthouse
Tampa, Florida
DATE: 27 November 2001
TIME: Commencing at 1:30 p.m.
REPORTED BY: Mary Elizabeth Blazer, RPR
Notary Public, State of Florida

STENOGRAPHICALLY RECORDED (ORIGINAL)
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ALSO PRESENT:
FLOYD J. KENYON, SR. (Plaintiff)
FLORENCE KENYON (Plaintiff)
APRIL GEORGE (Paralegal to Mr. Acosta)
DAN DONAHUE (Corporate Rep. of R.J. Reynolds)
CHARLES WRIGHT (Technical Assistant - R.J. Reynolds)
STEVE BERESHEIM (Technical Assistant - R.J. Reynolds)

I N D E X T O P R O C E E D I N G S

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(1:37 p.m.) P R O C E E D I N G S

THE BAILIFF: All rise. Civil court is now back in session.

THE COURT: You may be seated.

MR. FUHRMAN: Your Honor, could I raise two points before the jury comes in?

Number one, would it be possible at the end of the day today to perhaps remind the jurors not to read any articles in the newspapers that just happen to appear today and I think there's cases on another unrelated tobacco case.

Another thing is, Mr. Denson and I have tried to resolve our differences on the Kathleen Vandy deposition and we haven't been able to do that. I think we may very well get to play that today. Is there any way we can try to work that out or argue that now or --

THE COURT: Well, based on what I understand the length of time, Mr. Acosta, it's going to take, I don't -- you probably won't have time to play it today. So, we can -- we can take it up. I don't know if you've got -- do you have a transcript there?

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MR. FUHRMAN: Yes, sir, I do.
THE COURT: Does it highlight the portions in dispute?
MR. FUHRMAN: Yes, sir. Well, it highlights everything that we would intend to play. And as I understand from Mr. Denson, everything that we designated on pages 11 through 15.
MR. DENSON: Right, pages 1 through 10, no problem.
THE COURT: Just hand it on -- just if you'll -- if you don't mind handing that up, I'll look through it.
MR. FUHRMAN: No, sir. And the only thing I would ask is if we would have an opportunity at the end of the day, whenever Your Honor choose, just to explain why we have designated what we have --
THE COURT: That's fine.
MR. FUHRMAN: Thank you.
MR. DENSON: Judge, the other thing I have is a bench brief and cases on our burden of proof regarding alternative design.
THE COURT: If you'll bring that up. Excellent. Okay.

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And go ahead and get the jury and we'll continue with cross-examination.

I anticipate that we'll just have -- Mr. Acosta, my understanding is you plan to finish -- you plan to take the rest of today?

MR. ACOSTA: I -- I don't know for sure, I may finish a little early or --

THE COURT: You're welcome to do that.

MR. ACOSTA: I do know that I will need a break, though, before 4:00, if that would be possible.

THE COURT: That is possible.

All right.

THE BAILIFF: All rise.

(Whereupon, the jury returned at 1:40 p.m.)

THE COURT: You may be seated.

Welcome back from lunch, ladies and gentlemen. Mr. Acosta, you may continue.

MS. PARKER: Your Honor, may I move back over?

THE COURT: You may.

MS. PARKER: Thank you.

MR. ACOSTA: May it please the Court.

Good afternoon, Dr. Townsend.

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THE WITNESS: Good afternoon.
BY MR. ACOSTA:
Q. I think where we left off was with a question or two about the necessity of removing the carcinogens from the cigarette smoke; is that about where you recall we were when we broke for lunch?
A. I think we were discussing something like that, yes.
Q. And as I recall, your testimony was that what Reynolds wants to do is to completely remove these things to the extent it can, correct?
A. Well, certainly that's a goal. You know, if it's at all possible to completely eliminate benzo[a]pyrene and other polycyclic aromatic hydrocarbons, absolutely that would be a desirable end point.
Reducing, having a major reduction, if you can't completely eliminate it, then that's also a major step forward.
Q. And I seem to remember from yesterday that there was another group of compounds -- and the cigarette -- when we talk about compounds, these are related chemicals; is that correct? Compounds in the cigarette smoke -- when you talk of a compound, you're talking about a group of related chemicals?

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A. No, if I used the word compound, chemical compound, I'm generally referring to one particular chemical entity, one particular chemical compound itself. And there may be multiple compounds in a class.

For example, polycyclic aromatic hydrocarbons is a class of compounds. Benzo[a]pyrene is one chemical constituent or compound that's a member of that class.

Q. Let's talk about those for just a second because I believe you mentioned that some of these compounds are found in foods, correct?

A. Yes; some are, yes.

Q. Ordinarily, those compounds that are in foods are digested and metabolized or altered by the stomach acids in the human body, correct?

A. They may be, yes. You know, again, I'm not familiar with the details of the metabolism of them, but certainly the exposure is different.

If you eat a steak, for example, that's been charbroiled and has a fairly high concentration of benzo[a]pyrene on it, of course it -- it -- the exposure to the body is different because you've eaten the steak.

Q. Well, the steak was one food. Were

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there some other foods that you mentioned?
A. Well, I said water, I believe. And then also talked some about atmospheric pollution.
Q. Now, steak doesn't cause lung cancer, does it?
A. I don't know.
Q. Have you ever seen any study ever that says that eating a steak will cause lung cancer?
A. No, I've never seen such a study. All I'm saying is that there are other means of exposure to the same kind of chemical constituents that are present in smoke; that's all.
Q. You remember back in 1953, Dr. Teague, in reviewing the literature found, that the literature indicated that 95 or so percent of the people that got lung cancer were cigarette smokers?
A. I remember something generally like that.
Q. You've never seen anything like that that said they're steak eaters?
A. No, of course not.
Q. And the lung is different than the stomach in terms of the way it reacts with things that come in contact with it?
A. I would assume it's different, sure.

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Q. Now, Dr. Rodgman in 1956 -- this is the scientist that later became a director of research and development, correct?
A. He was a director in the R & D department, yes.
Q. Back in 1956, he wrote a report and I believe it was identified as -- let me see if I can find it here, Plaintiffs' -- I think it's 1645, but hang on a second until I get to the right place.
1645. And that was put up on the screen there by Ms. Parker and you were asked a few questions about it.
Do you recall that Dr. Rodgman -- the purpose of his study was to describe the experimental investigation on the isolation or identification of several of the polycyclic aromatic hydrocarbons present in the cigarette smoke condensate from Camel blend cigarettes?
A. I think in general that was his purpose, yes.
Q. And I think -- is it fair to say that -- that the -- well, let's strike that.
Let me -- let me ask you this: And he identified a number of hydrocarbons, as we've discussed; approximately eight of them, correct?

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A. I think he said eight, yes.
Q. And he indicated that statistical studies, both retrospective and prospective, 20 altogether, indicated that cigarette smoke was a major causative factor in the present high and increasing incidents of cancer of the respiratory system in the human; do you recall that from his report?
A. I remember -- I remember some discussion, but if you're going to ask me questions, I would like to read the whole document.
Q. Sure.
MR. ACOSTA: May I approach, Your Honor?
THE COURT: You may.
THE WITNESS: Thanks.
Okay. What page?
BY MR. ACOSTA:
Q. Let me see if I can find the page.
The top of page 5.
A. Okay, I'm there.
Q. Did I read that correctly? Statistical analysis based on retrospective 18 citations and prospective two citations, clinical studies have indicated that tobacco smoke, and in particular

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cigarette smoke, is a major causative factor in the high and increasing incidents of cancer of the respiratory system in the human?

A. You read that correctly.

Q. Then Dr. Rodgman indicated toward the end of the study -- let me see if I can give you the page number for this; at page 37 of his report.

A. Okay.

Q. It says, "Since it is now well established that the cigarette smoke does contain several polycyclic aromatic hydrocarbons and considering the potential and actual carcinogenic activity of a number of these compounds, a method of either complete removal or at least complete removal of these compounds from cigarette smoke is required."

Does that agree with your position at Reynolds today?

A. Yes, absolutely.

Q. Can we have Exhibit 1653?

Then in 1959 --

MR. ACOSTA: May I approach, Your Honor?

THE COURT: You may.

BY MR. ACOSTA:

Q. Exhibit 1653, it says -- it's a Rodgman

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report that's titled, The Optimum Content of Cigarette Smoke, I believe; is that correct?

A. No, it's The Optimum Composition of Tobacco and it's Smoke.

Q. Okay. Composition of tobacco and the smoke.

And he indicates in addition to the work that was reported in 1954, reporting the -- the presence of the carcinogenic cancer producing polycyclic hydrocarbon, 3, 4, benzo[a]pyrene, since that time, 60 similar compounds have been isolated from the smoke. Was that work done at Reynolds?

A. I think it's a combination of work done at Reynolds and work done in other laboratories; that would be my take on this -- this document.

Q. Okay.

And then he indicates near the end of the study, I guess at page 3, that the cigarette smoke should contain as little as possible, preferably at the zero level, of the polycyclic hydrocarbons; do you see that under the sub heading discussion?

A. Yes, I see those -- those words.

Q. And again, that is a position that -- that Reynolds takes today. But back then, at the

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very bottom there's a footnote. And he says that the -- we consider the zero level to be impossible to achieve as long as the combustion temperature of the cigarette is greater than 700 degrees; is that accurate?

A. That's what the footnote says, yes.

Q. And it's true that the combustion temperature of the cone or the fire cone of the cigarette resides above 700 degrees centigrade?

A. That's correct.

Q. That would be somewhere around 1400 degrees Fahrenheit? More or less?

A. More or less.

Q. And it's at that temperature that these chemicals are produced; is that correct?

A. Polycyclic aromatic hydrocarbons are produced at very high temperatures, certainly in excess of 700 degrees.

Q. And you would agree that the strongest concentration of them inhaled by humans in general would be through a cigarette?

A. I don't know that. There have been studies done in certain large cities, as I referred to in my direct testimony, where high concentrations of polycyclics have been found in the air in those

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large cities, primarily from automobile diesel exhaust and other combustion sources.

How that compares to -- to cigarette exposure, I really can't say.

Q. Well, you -- do you recall testifying in the past that the strongest exposure came from cigarette smoke?

A. I can't recall that specifically, no.

Q. No?

(Pause)

Maybe I'll find that over a break and I'll see if I can refresh your recollection. Well, wait, here it is, page 62.

Before I read it, let me show it to you and see if it refreshes your recollection.

MS. PARKER: Your Honor,I object, it's not consistent.

THE COURT: At this point, Mr. Acosta, is simply handing the witness a document.

THE WITNESS: I think this says something different than you were suggesting. It says -- and my answer to a question is -- I'm not even sure what this is from. What trial this?

BY MR. ACOSTA:

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Q. This is from the Jones trial?
A. The Jones trial. So, that's the one here in Tampa.
I answered a question --
Q. Here's the question.
A. Let me -- the question is: Let me go back to this. The largest concentration of polycyclic aromatic hydrocarbons inhaled by smokers in the main stream smoke of cigarettes?
And then my answer was: I think there are many other exposures to polycyclic aromatic hydrocarbons. Cigarette smoking is one of the stronger ones. Certainly in benzo[a]pyrene and other polycyclics are present in air, they're present in the food we eat. There's exposure everywhere.
So, I did say cigarette smoking is one of the stronger ones. I think that's -- that's an accurate statement.
Q. Okay.
A. I think what you were suggesting was that perhaps -- or at least my take on your question was you were suggesting that I said it was the strongest.
Q. All right.
Well, it's at least one of the stronger

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ones?
A. I think that's fair, yes.
Q. And you would -- do you agree with Dr. Rodgman back in 1959 that it would be wise to remove as many of them as possible from cigarette smoke?
A. Absolutely. And that has been our objective in product development at R.J. Reynolds, to reduce as much as possible, to eliminate if possible, a host of constituents in smoke that are thought to be related to disease.
Q. All right. Let me ask you this: Then there would be absolutely no reason for Reynolds to ever say removal of them is unwarranted, would there?
A. Removal is unwarranted?
Q. Yeah.
A. I wouldn't say that in a simple context as the way we're discussing. Again, I don't -- I don't know what you're referring to.
Q. Okay.
Let me show you Plaintiffs' Exhibit 693-42, which has been previously admitted into evidence. And I want to show you --
MR. ACOSTA: Your Honor, if I might put this on the screen.

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THE COURT: You may.
MR. ACOSTA: Thank you, Your Honor.
BY MR. ACOSTA:
Q. All right.
At the top it says, partial list of questions which may be asked by business analysts on September 20, 1976; this is an R.J. Reynolds document.
And on page 2, number 18: In the event that certain ingredients in tobacco or smoke are shown to produce a disease in animals, would you be able to remove them from your products?
Answer to 18: Because of the small amounts of material under consideration, complete removal is totally unwarranted.
Did I read that correctly, Doctor?
A. You read that correctly, yes.
Q. Thank you.
Now, nitrosamines are another constituent of cigarette smoke that Reynolds has been aware of and has attempted to remove. Do you recall a discussion about that yesterday?
A. Sure.
Q. And what you testified about is that Reynolds made some discovery recently, 19 -- late

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1990s about flue-cured tobacco?
A. Yes.
Q. And that Reynolds was now endeavoring to eliminate the nicotine specific nitrosamines from cigarette smoke because they are potential human carcinogens, correct?
A. I think you've paraphrased it.
First of all, I didn't say that we've been able to eliminate nitrosamines. I did say that through the heat exchange -- heat exchange or curing technology where we retrofit Barnes, we've been able to see more than a 90 percent reduction. But that's still not totally eliminating it. But it's still more than a 90 percent reduction.
Q. And you -- you categorized it as a discovery, I believe?
A. Yes.
Q. What do you mean by a discovery?
A. Our scientists worked for a number of years, painstakingly to try to figure out how nitrosamines are formed in tobacco. Because in green tobacco leaf, when tobacco is taken out of the field, if you measure for tobacco specific nitrosamines you don't find tobacco specific nitrosamines. So it's not present in the leaf when it comes out of the

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field. This is for flue-cured tobacco. When it comes out of the field there's no tobacco specific nitrosamines.

But then when we, the tobacco manufacturer, the cigarette manufacturer, buys cured tobacco from farmers on auction, we find tobacco specific nitrosamines. So, it was a detective's -- a detective story trying to track down just how these tobacco specific nitrosamines were formed, at what point they were formed between the period of the field and the time we buy the tobacco at auction.

And we discovered it was through the curing, then through a number of -- a couple of years investigation we figured out why, and it was the presence of the nitric oxide in the flue gas in the barn that caused the formation of these. Then we discovered a way to substantially reduce the formation and that's through the use of heat exchangers.

Then we went through two years worth of field trials with real farmers where we converted their barns, taught them how to cure -- flue-cured tobacco using that new -- that new approach to the curing. And in fact, once that was successful, then we went out and essentially walked away from the

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auction floor and started doing direct contract farming with -- with farmers. Where they would grow tobacco for us directly under contract. And that -- and they would have to guarantee that they would do it properly and have low tobacco specific nitrosamine levels.

Q. And I believe you just mentioned that investigation took a couple of years?

A. It took several years, yes.

Q. And were you involved in that yourself?

A. I was responsible for a portion of it, yes.

Q. And when did you begin looking into nitrosamines in that way?

A. When -- well, that's kind of a broad question.

Q. When did Reynolds start investigating the removal of nitrosamines?

A. Tobacco specific nitrosamines we developed test methodology in the '70s, and at that point we began looking at how -- what are ways to reduce or eliminate tobacco specific nitrosamines. And there is one of the largest difficulties in this whole exercise was to develop reproducible test methods. Because tobacco specific nitrosamines are

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very reactive in getting reliable analytical data was extremely difficult. But even back in the early '90s we were investigating ways to try to reduce nitrosamine formation, TSNA formation, through the use of a spraying anti-bacterial materials on tobacco.

Because at that point, we thought the formation was a result of microbial action. That there were microbes that actually formed nitrosating species like nitric oxide and that it was a microbial mechanism in the formation, we were wrong and we ultimately found the right reason.

Q. Well, let me ask you this: There are two types of tobacco we're talking about, one is flue-cured the other is burley?

A. That's right.

Q. And you thought the microbial reaction may involve nitrosamines in burley, didn't you?

A. Yes. In fact, today we still think that's the main route of formation for burley tobacco. And burley is actually quit different than flue-cured. But for flue-cured, it turns out that was not the mechanism.

Q. So for clarification sake you still believe in the microbial theory for burley, but for

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the flue-cured you believe that the nitrosamines are created through the curing process itself or at least were up until maybe recently?

A. Well, not only do we believe it, we've proved it and it's in practice. Yes.

Q. And were you -- did that investigation began after you arrived at Reynolds or was it already underway before you got there?

A. Well, work on tobacco specific nitrosamine test methods, trying to find out how much is present in tobaccos, that began I believe before I got to Reynolds. But there has been work, and most of the investigative work trying to figure out how to reduce or eliminate has been since I got here.

Q. Since you got there?

A. Uh-huh. (Indicating affirmatively)

Q. Well, isn't it true that Reynolds was aware of nitrosamines potentially in cigarette smoke at least as of 1964?

A. If you listen to my -- my direct testimony, there are two classes of nitrosamines. There's the regular nitrosamines, which I called volatile nitrosamines. Now, they were discovered and identified and, in fact, Reynolds quantitated a number of them in the '60s. So those are the simple

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nitrosamines. The same kind of nitrosamines that are found in bacon and beer and other consumer goods.

Tobacco specific nitrosamines really became under a -- came under intense interest or scrutiny and investigation in the '70s. So two different classes, yes, Reynolds was working on the -- on the volatile nitrosamines in the '60s, and then in the '70s, as we began to learn that tobacco specific nitrosamines were really present, that's when we began the work there.

Q. And the reason Reynolds did that back in the '60s is because it knew that nitrosamines in general, whether it's the nicotine type or the other fine, were carcinogenic for different organs in animals?

A. Yes, we believe that certain nitrosamines, particularly those vapor-phased nitrosamines were carcinogenic. In fact, some of them are on the IARC2, 2A or 2B list, I can't remember.

Q. And I believe during your direct testimony you mentioned that you had had some kind of discussion with a Dr. Hoffman about his research because he had found that nitrosamine levels were increasing as other constituents in smoke were

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decreasing? Is that true?
A. Essentially, yes. Dr. Hoffman had reported in the literature some data that suggested that nitrosamine levels, tobacco specific nitrosamine levels, were increasing gradually over time. And our internal data did not suggest that at all.
Q. In fact, he reported that to you at a -- a meeting that you went to back in the mid-1990s, is that right?
A. Yes.
Q. You were invited as an industry representative to a national, is it Cancer Institute meeting?
A. I can't remember whether our discussion was at the NCI meeting in 1994 or whether it was in the Canada meeting in 1996. But at any rate, I did discuss it with him. He has actually published this in a journal.
Q. In a monograph?
A. I think it's in there as well, yes. There also another place.
Q. You've seen this monograph?
A. Yes.
Q. It's by the National Institute of Health? It has quotations from you and Dr. Hoffman

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and others in it?
A. Yes.
Q. And this meeting was called together to discuss human smoking behavior as opposed to what's measured with a machine, is that essentially what the gist of this meeting was all about?
A. Well, the actual purpose of it was to examine the Federal Trade Commission smoking method and see if it's still appropriate to use.
Q. Okay. And it's reported -- well, let me show you this, this -- may I place this on the screen, Your Honor, it's a graph from the monograph he used?
MS. PARKER: Your Honor, could I have a identification of page?
MR. ACOSTA: Yes, you may. It's page 31. 30 and 31.
THE COURT: All right. You may publish it.
BY MR. ACOSTA:
Q. Now, the lower -- have you seen this before, Dr. Townsend?
A. Yes.
Q. The lower graph there shows a reduction over time. Well, first it shows an increase in BaP

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which is benzo[a]pyrene from 1960 up through 1965 or so. And then it shows a general reduction of benzo[a]pyrene until it reaches sort of a flat level over here toward 1990, is that accurate?

A. Are you asking if the data are accurate or your interpretation or --

Q. No, what this graphs shows?

A. That's what this graph shows, yes.

Q. And then here's he's plotted nicotine specific nitrosamines, indicating that they were rising from 1985 to 1993 or 1994. And I guess my question is: He found that that was true for cigarettes in general, is that your understanding?

A. No, I think if you look at the top legend, what he did was he took a standard non-filtered cigarette and measured the -- not the total specific nitrosamines or tobacco specific nitrosamines, but one particular one of those called NNK and he measured those over time for samples that he took out of the market. And those are exactly the data that we don't see increasing in our literature.

Q. And I believe you said that your data indicated that this was incorrect?

A. What I said was, we don't see that increase in the data that we have internally for

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commercial cigarettes taken from the market over time.

Q. But in any event, somewhat shortly after this, that's when you began this discovery or this investigation on the flue-cured aspect of these nitrosamines?

A. We were conducting the research, even before that was published, and before that 1994 conference.

Yes, our discovery was after that, yes, of course.

Q. Okay. While I have this, let me ask you a couple of other questions here.

You have indicated that the goal has been to take things out of smoke that cause disease, is that accurate?

A. To understand -- yes. To understand what's in smoke and remove those things that may, whether you know -- whether you're absolutely sure that they cause disease or not, they even may be related to disease, yes, to eliminate or, if you can't eliminate remove as much as possible.

Q. Okay. Well, let's talk about that for a second.

If some things are risky it means that

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it can cause something bad to happen, is that the way you would look at the term "risk"?

A. Well, in a general sense, yes.

Q. All right. And when applied to cigarettes you would look at it, if you smoked a cigarette, it can cause something bad to happen?

A. It depends on the level. Many constituents in smoke are present at extremely low levels, trace levels. So a compound -- when applied to mice skin on their backs in that particular test may in fact show tumorigenic results. And if the concentration found in smoke or even in air or where ever, you may not see the same result. All I'm saying it's a -- it's a dose dependent response. And we don't know, for example, the -- with the level of benzo[a]pyrene, to use an example, just how that may relate directly to disease.

Q. I think you read my mind. There is a dose response relationship when you talk about level to the number of cigarettes that you smoke, true?

A. I would expect that. There's also a dose response relationship in terms of how much of any given chemical constituent is present in smoke. For example, benzo[a]pyrene is present in the nanogram level per cigarette. That's a billionth --

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a billionth of a gram per cigarette. Is that meaningful in terms of causing disease? I don't know the answer to that. But benzo[a]pyrene certainly has shown mouse skin tumorigenicity, is it a compound that we want to reduce or eliminate, you betcha.

Q. And it's just one of 43?

A. And it's one of -- I think more than 43.

Q. One of more than 43. And you're aware, that the more you smoke the higher the likelihood is that you're going to get the disease, right?

A. I think -- yes. The basic tenant of toxicology, the way I understand it is, less ought to be better, and more probably is worse.

Q. And with respect to the cause, you said that it is believed by Reynolds that cigarettes are a cause of lung cancer?

A. No, I didn't say that. I said that cigarette smoking is clearly a major risk. It carries inherent strong risks for lung cancer, cardiovascular disease, a number of other diseases, and it may indeed cause cancer, particularly for some specific individuals.

Q. So, is it the position of Reynolds, that cigarettes can cause lung cancer? Yes or no?

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A. I think it is the position that it -- that it can or may cause it particularly for some individuals. And -- and the reason I qualify that for some individuals is because we're learning more and more about the genetic aspects of tumor formation.

Q. Do some individuals have some kind of identifying characteristic where they can look at themselves in the mirror and say, I'm not one of them?

A. I don't know. I think there's some research going along those lines even as we speak.

Q. In fact, that kind of research has been ongoing at Reynolds for 50 years?

A. No, that's absolutely not correct. That kind of research has been going on in the scientific community. We don't have that kind of medical research capability at Reynolds.

Q. Okay. In any event, Reynolds does take the position that at least cigarettes can in some individuals --

A. Sure.

Q. -- cause lung cancer?

A. Yes.

Q. What's the proof of that?

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A. Sorry?
Q. What is the proof?
A. What is the proof?
Q. Yeah, what's the proof?
A. You mean what leads us to that conclusion?
Q. No, what is the proof that Reynolds relies on in taking the position that cigarettes can cause lung cancer?
A. I guess I don't understand your question. What's the proof that Reynolds relies on?
Q. Yes.
A. You mean what's the basis of that conclusion?
Q. I'm asking you what Reynolds says the proof is. What is the proof?
A. I'm sorry, you've completely lost me. Are you asking me what's the underlying basis for arriving at that conclusion? I don't understand what you're saying? What's the proof that you've concluded that.
Q. Well, do you know -- do you know when you do a study that you attempt to -- you set a hypothesis or objective, correct?
A. Yes.

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Q. And then you attempt to prove it, don't you?
A. And you attempt to prove the hypothesis.
Q. Okay. All right. Let's assume that cigarettes cause lung cancer as Reynolds now takes the position that it might do, what is Reynolds proof that it does?
A. If you -- to lead -- let me -- let me try to answer your question even though I think it's coming at it from a different angle. If you look at the statistics, the epidemiology, the fact that cigarette smoking is such a strong risk for lung cancer has led many people to believe that cigarette smoking by itself, in itself causes cancer, okay?
In spite of that, classically science has looked for other -- other pieces of information that -- to lead to the conclusion of causation. And one is demonstrating a mechanism, having an animal model, and there are others.
And some of those things don't exist, but I think the statistics, the epidemiology as well as all of the other laboratory data that has been conducted is not inconsistent with the hypothesis that cigarette smoking may cause cancer. It's not

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inconsistent at all.
And so, we've -- Reynolds has actually taken the position that cigarette smoking may cause cancer, particularly for some individuals.
Q. And when did Reynolds first do that?
A. I think -- well, I can't really answer that. I don't know when that became the official position. I can tell you that many people in Reynolds have a wide range of personal opinions.
Q. I don't care what their personal opinions, I'm just asking what Reynolds position is. Did you all take a vote? Did you take a vote at Reynolds?
A. Actually we've had many, many discussions within the research and development department picking apart and trying to understand all the science behind it. Did we take a vote throughout the organization? No.
Q. All right. But today it is Reynolds' position, and don't you remember just a couple of years ago down in Miami when you testified down there in the Engle case that it was Reynolds' position that cigarettes didn't cause disease?
A. No that's not correct at all.
Q. Oh, it's not?

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A. The position was it wasn't proved that cigarette smoking caused lung cancer.
Q. All right.
A. And there is a difference, because in -- in the '80s and even the early '90s, R.J. Reynolds and, I think, many other people, not even just industry people were looking for demonstration of mechanism, demonstration of an animal model which would all classically lead to proof of causation.
And at that point, it becomes a very intense scientific argument. Today most people believe, including Reynolds, that if you look at -- if you look at all the evidence, all the laboratory information, and especially the epidemiology, you might -- you should conclude or you do conclude that cigarette smoking may cause it.
Now, that's not -- that's not definitive proof that cigarette smoking by itself, in itself does, in fact, do it, but -- but it probably does.
Q. It probably does.
A. That's my words.
Q. Now, is it Reynolds' position that it probably does?
A. I've already given you Reynolds'

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position. Cigarette smoking may cause --
Q. I want to distinguish yours from Reynolds.
A. That's what I was trying to do, too.
Q. Now, your -- this position that Reynolds has come to, was that a position that Reynolds took in 1985?
A. The position that on causation today?
Q. That cigarette smoking can cause lung cancer.
A. No, because in 1985 there was -- the position was based more on the classical scientific approach to establishing causation.
Q. Well, let's talk about that for just a second.
You've heard the story of the Broad Street pump?
A. No.
Q. You've never heard that story?
A. I don't think so.
Q. About cholera and how they discovered that cholera was a cause of -- was caused by a pump in a street corner in England, and the way they determined it was because a doctor mapped it out and had the authority shut down the pump, and then the

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epidemic went away in the 1850s. But he didn't know what cholera really was at the time, but concluded that cholera was caused by this pump of water that was pumping up contaminated water.

What you just mentioned a minute ago was that Reynolds didn't know the mechanism. Now, the mechanism is, as we talked a minute ago before lunch -- remember the genetic p53 gene that can be attacked by a metabolite of benzo[a]pyrene? Do you recall that testimony?

A. I recall that discussion, sure.

Q. That would be a mechanism?

A. I think that's exactly correct. That could be at least a part of the mechanism.

Q. Now, when you -- when you drop something, it hits the floor by gravity, doesn't it?

A. Unless you throw it.

Q. What's the mechanism of the gravity?

MS. PARKER: Your Honor, I think we're getting both beyond the scope of direct and beyond his expertise in cigarette design.

THE COURT: We'll overrule for the time-being. Go ahead and answer the question, if you can.

BY MR. ACOSTA:

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Q. We know that gravity causes this to fall, but we don't know why, do we?
A. I think physics is working real hard in understanding gravity. It's been a very elusive thing to describe mathematically.
Q. Did -- so, Reynolds didn't know in 1985; but for some reason today, Reynolds does know that cigarettes is a cause of -- and what I want to ask you is, what happened between 1985 and today to cause Reynolds to change its mind?
A. I think you've mischaracterized my testimony in saying that Reynolds said one thing in 1985 and then today is saying it was something else. I will tell you again, in 19 -- in the middle 1980s, I think Reynolds' position was, "You know, we really don't know whether cigarette smoking by itself, in itself, separate from any other exposures, causes directly lung cancer." And the reason is because of science, and not just Reynolds, as you are suggesting; but many, many scientists outside the industry even, in the medical community, regarded classical -- the classical approach to defining causation as a series of things -- a series of things that you had to know, including having an animal model; for example, an animal model that when smoke

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is inhaled in that animal, it created lung tumors. There is no animal model where when cigarette smoke is inhaled lung tumors are created. It does not exist. And people have tried for many, many years.

So, that doesn't exist. The mechanism is not known, although I agree with you. Genetic molecular toxicology -- molecular toxicology in genetics is leading us where I believe we will know the mechanism, and I believe we'll know it pretty soon.

But anyway in the mid '80s, people, scientists -- and not just Reynolds scientists -- needed to see the classical approach to saying, "Yes, this causes that." What's happened since the 1980s is that people are moving toward a looser -- a looser conclusion of causation and are willing to say for a variety of reasons -- are willing to say that, yes, for example, cigarette smoking is a very strong risk for lung cancer; and it's so strong that it probably causes it. And in Reynolds' case today, we say, "Yeah, it is so strong, it may cause it." And by the way, if you look at all the laboratory evidence around, be it -- be it toxicology from test tube studies or from wherever, there's nothing that's inconsistent with that picture.

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Q. There never has been, has there?
A. I think there has been; but again, you know, you're really outside my area on biology, but --
Q. Well, I don't mean to go outside of your area in biology, but I want to stay within your area as executive vice president of R.J. Reynolds Tobacco Company and what you told the jury so far.
A. Thank you, and what I'm trying to do is clarify where you see a difference and why there is a difference, because things really have changed. Things don't stay static. You know, they really don't.
Q. Well, what I asked you, though, is what is the scientific discovery that occurred between 1985 and 1999 or 2000 or 2001 when Reynolds has now got this new position? That's what I want to find out. Has there been a scientific discovery that we don't know about?
A. And, sir, if you'd listen to my answer, you would know the answer to that; and it is a relaxing in the standards of what defines causation. It's moving away from the classical model of saying, "I need to see this full list of things to say, 'Yes, this causes this.'" Moving away from that classic

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rigid model to one that is looser and says, "Here's all the evidence, and I think it may cause it," okay, even though some major pieces of the classical approach are missing. That's the difference.

Q. Where is this classical approach written down?

A. I think if you talk to most toxicologists, they would delineate in exactly the same way the same story. I'm not a toxicologist, but you're welcome to talk to toxicologists and find out.

Q. Don't you think there were a few toxicologists that consulted with the Surgeon General in 1989?

A. I'm sure there were.

Q. And so, in 19 -- 1989, what you're telling me is that Reynolds disagreed with the Surgeon General when the Surgeon General said cigarettes cause cancer, lung cancer?

A. In 1989, I think there may have been different points of view.

Q. And how about in 1979? You -- you were shown a portion of the Surgeon General's report from 1979 during your direct testimony. Do you remember that? You had a graph, I think, or something that you made from it.

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A. Sure, I did.
Q. Let me --
MS. PARKER: Your Honor, may I --
MR. ACOSTA: I'm going to give you the cite in a second, as soon as I find it.
BY MR. ACOSTA:
Q. All right, I'm going to read from this paragraph right here. It says --
THE COURT: What page is that, Mr. Acosta?
MR. ACOSTA: That's on the Secretary's Forward. It's the very first page.
"Today, 15 years after the original report, we publish a new Surgeon General's report on smoking and health. This book is more than a compendium of new data confirming the conclusions of the original report, for this document reveals with dramatic clarity that cigarette smoking is even more dangerous -- indeed, far more dangerous -- than it was supposed in 1964."
Going to page II -- whoops. If I can get this up here so you can see this.
"This document is significant for another reason. It demolishes claims made by

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cigarette manufacturers and a few others 15 years ago and today that the scientific evidence was sketchy; that no link between smoking and cancer was proven. Those claims, empty then, are utterly vacuous now.

BY MR. ACOSTA:

Q. Did Reynolds disagree with the Surgeon General back in 1979?

A. About strict causation? I don't think Reynolds probably agreed in 1979 on strict causation. Did Reynolds believe that there was an association between cigarette smoking and lung cancer? You bet. Do we believe in 1979 that it was an extremely strong correlation with lung cancer? You bet. Were we doing everything we knew how to do to reduce the risks of cigarette smoking? You bet.

Q. But you were denying that it had been proven, weren't you?

A. Because this was a scientific debate going back to what I've already said three times now, that there are differences of opinion about what defines causation. How do you prove that one thing directly causes another, particularly when there are so many different exposures of other things involved? How do you prove one thing causes another? And some

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scientists, and not just Reynolds scientists, believe that to prove causation you need certain pieces of information, including an animal model and a mechanism. Other scientists approach defining causation much looser.

But that doesn't in any way negate the fact that Reynolds took the smoking and health issue seriously; that we recognized that cigarette smoking has -- poses strong inherent risks for smokers; and that we in R & D were doing everything that we knew to do to reduce those risks and, by the way, were successful.

Q. Well, you remember Dr. Senkus, don't you?

A. Yes.

Q. He was director of research there at Reynolds?

A. Yes.

Q. And I believe during your direct testimony you testified that Reynolds participated with the National Cancer Institute, Dr. Gori?

A. Yes.

Q. And Dr. Gori was working on a project through the National Cancer Institute to come up with this lower tar idea -- lower tar, lower nicotine

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cigarette; correct?
A. Low-tar, medium-nicotine cigarette, and that was only one aspect of the work of NCI-TWG.
Q. Let me show you what's been marked as Plaintiffs' Exhibit 1679 and ask you if you would identify this for the jury, please.
(Pause.)
A. Okay.
Q. All right. This is a letter from Murray Senkus, and it has his name here at the top, "Murray Senkus, director of research, R.J.R., to Dr. Gori"; right?
A. That's correct.
Q. It's dated 1972?
A. That's right.
Q. In fact, you've seen it before and testified about it before?
A. I'm sorry?
Q. You've seen it and testified about it before?
A. Yeah. I think it's been awhile, but I have seen this before, I think.
MR. ACOSTA: Your Honor, may I display this?
THE COURT: What's the exhibit number?

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MR. ACOSTA: It's Exhibit Number 1675 -- 79, excuse me.

THE COURT: You may.

BY MR. ACOSTA:

Q. It says, "Dear Gio, in his letter of March 6, 196" -- I think that's a 68 -- "Dr. Kenneth Endicott" -- let me find my laster pointer. I guess I can do it without a laser pointer.

In his letter of March -- dated March 6, 1968, Dr. Kenneth M. Endicott, the director of the National Cancer Institute, invited me to become a member of what we now refer to as the Tobacco Working Group of the Lung Cancer Task Force. In my reply to that letter on March 27, 1968, I accepted his invitation to join the group, and I stated therein that I would make available my experience and knowledge in research relating to the tobacco -- relating to tobacco and smoking. I enclose herewith a copy of my letter since it may not have come to your attention.

"In your testimony before Senator Moss on February 3, 1972, you depicted my participation in the group correctly when you stated at pages 76-77, we have representatives, technical representatives from the tobacco industry, and they serve as advisors

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to the National Cancer Institute."
The last paragraph of the front page there --
MS. PARKER: Your Honor, under the rule of completeness, I would like to have Mr. Acosta complete that sentence.
THE COURT: Go ahead and finish that sentence.
BY MR. ACOSTA:
Q. All right. "... served as advisors to the National Cancer Institute in the conduct of research and activities in the field insofar as they have been giving us the greatest cooperation, and as far as technicalities of developing a cigarette, the engineering of a cigarette, the chemistry, they have been very helpful."
I'll just read the rest of it.
"As you have explained, I have always been willing to help NIH in conducting its research by making available my expertise in the field of tobacco technology, and I continue ready to assist the Tobacco Working Grown in its research as long as I am not calling upon -- am not called upon to divulge information of a proprietary nature."
Then he says, "Senator Moss did not

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specifically acquire at his hearings -- inquire at his hearings whether the members were always in complete agreement at the meetings of the Tobacco Working Group. In any event, as I stated to Dr. Endicott when I accepted membership in the group, I am in no manner accepting the view, one, that present cigarettes are hazardous; two, that the smoke of such cigarettes causes or contributes to the development of human lung cancer."

Now, as a member --

MS. PARKER: Your Honor, under the rule of completeness, I would like to ask Mr. Acosta to complete that.

MR. ACOSTA: I don't know what that -- how that needs to be completed, Your Honor.

THE COURT: I'd assume you read the remainder of the paragraph.

MR. ACOSTA: I'll finish the paragraph.

"There have been occasions when I questioned the validity of certain experiments, as on November 9th, 1970, on the occasion of Dr. Auerbach's presentation to the group of his beagle dog studies."

MS. PARKER: And the next paragraph as well.

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MR. ACOSTA: Judge, this is not the rule of completeness.

THE COURT: I have to see it to -- to be able to rule one way or another.

MR. ACOSTA: It will be quicker for me to read it than it is to show the Court, but I object to the way it's happening.

"It has never been my nature to disagree with every plan that is contrary to my opinion at the meetings. But nonetheless, my silence does not imply endorsement of each program. In fact, I have not understood that it was part of my function to approve or pass upon each of the research proposals coming to the attention of the group. Rather, I have sought to make available my knowledge and experiment -- experience in the technicalities of developing cigarettes and the engineering of cigarettes and the chemistry of tobacco and smoke and to assist in carrying out whatever experiments the government determines to approve. But whatever the reservations, please be sure of my sincere desire to be of assistance as a scientific advisor."

BY MR. ACOSTA:

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Q. Now, going back to the second page here, as a representative of R.J. Reynolds -- and it was his position as director of research there that cigarettes were not hazardous and that the smoke of such cigarettes -- let me read it. He says, "I am in no manner in acceptance of the view that present cigarettes are hazardous or that smoke of such cigarettes causes or contributes to the development of human lung cancer."

Did I read that part correctly?

A. I think you did.

Q. So, this research, trying to make cigarettes less hazardous, Reynolds would do that if -- why would Reynolds do that if the cigarette wasn't a hazard? Is there an answer to that?

A. Well, I think there's a very clear answer.

Q. There's a very clear one?

A. Yes.

Q. Let's hear it.

A. First of all, this may well be Murray Senkus' personal opinion. I don't think that the view that cigarettes -- cigarettes are not hazardous, I don't think that was Reynolds' position, and I don't think that was most people's at Reynolds

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position either, scientists or businessmen or anybody. What is important is that Reynolds took the smoking and health issue seriously. We have continued to view cigarette smoking as a risk for a number of diseases; and whether individuals like Murray Senkus believe it directly causes or not is immaterial, because what Reynolds has done, words speak louder -- actions speak louder than words. What Reynolds has done is, in fact, address those issues through science, through reducing the levels of constituents through selective and general reduction, through developing new types of products like tobacco heating; and we've been successful at it.

Q. So --

A. Regardless of what any individual may personal believe about causation.

Q. This doesn't say personal on there, does it?

A. It's a letter from him to Dr. Gori. I would assume so. He doesn't say it's a company position either.

Q. Well, he says; "you've correctly stated that we have representatives -- well, it's even better than that. "In your hearing before Senator

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Moss on February 2, 1972 you have depicted my participation in your group correctly, when you stated at pages 76, 77, we have representatives, technical representatives from the tobacco industry".

He was there as a representative of the tobacco industry, wasn't he?

A. He was there as a representative of the tobacco industry. But that in no way means that that last sentence on that page would reflect anything other than his personal opinion. And I do know that in 1972, R.J. Reynolds was not saying "cigarettes aren't hazardous".

Q. How about lung cancer. Didn't you just tell us a minute ago in 1985 that Reynolds did not conclude that cigarettes were not a cause of lung cancer?

A. But that's different than what he says here.

Q. He says here that cigarettes don't cause lung cancer in 1972.

A. And that's not what Reynolds said in 1972 or before. Reynolds doesn't say and never has said, to my knowledge, that cigarette smoking does not cause cancer. That is absolutely a misrepresentation of the facts.

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The facts are that Reynolds said for many years the scientific evidence isn't complete to define causation. The risks are there, cigarette smoking is risky. Even Bowman Gray, one of our CEOs from long, long ago said "cigarette smoking is probably hazardous".

Q. I just want to -- you're telling us today that Reynolds has never taken the position that cigarettes don't cause cancer? Never taken that position?

A. I don't -- I don't remember seeing a single case where -- where the company has said cigarette smoking does not cause cancer.

Q. Well, let me see if I can show you one. This is Plaintiffs' Exhibit 2054.

Whoops.

(Pause)

Doctor, let me -- let me just skip that one, and I'll go directly to Plaintiffs' Exhibit Number 1.

You've seen that before, the Frank Statement, haven't you?

A. I've seen the Frank Statement of cigarette smokers. Not in this format, though.

Q. And it was published in a number of

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formats, wasn't it?
A. A number of formats? I've seen one format that was -- that was published in a newspaper -- I mean, I've never seen that particular --
Q. Are you referring to the one that was published in the New York Times?
A. Yes.
Q. You're aware that there's about 15 or 16 copies on this on the Reynolds Web site in different formats of one type or another?
A. No, I'm really not aware of that.
Q. Well, you're aware that Reynolds signed on to this as a sponsor, correct?
A. Yes.
Q. And in it Reynolds says there's no proof that cigarette smoking is one of the causes?
A. Yes. In 1954, that's what Reynolds said, yes.
Q. And it said -- and it continued to say that for a long time, didn't it, at least through 1985?
A. It continued to say that in numerous occasions for a number of years. I don't know exactly for how long.

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Q. Do you remember in this document it says "we believe the products we make are not injurious to health"?
A. Yes.
Q. Wouldn't you say cancer is injurious to health?
A. I think that -- that's a different -- it's a different statement, really. But certainly I think that in 1954 the science was just emerging. In 1953 and 1954, that science was just emerging about the risks of cigarette smoking. Yes, to your point earlier there had been a number of miscellaneous studies from years before, but it was in the early '50s that the epidemiology started coming together, the mouse skin painting started coming together. And it's not inconceivable for me to believe that in 1954, the company in the midst of all that controversy might -- might provide a statement of their belief, really.
This is not a scientific statement like "cigarette smoking does not cause lung cancer". I mean, it's not a hard scientific statement. This is a statement of belief. Those particular individuals believed that product we make are not injurious to health. Would we say that today? Of course not.

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Were they wrong in 1954? Well, that was their belief. The science today suggests that -- that that's not true.

Q. This is the company that designs, manufactures and sells the product, and this was their statement to smokers. That they didn't believe that it caused cancer.

A. That they didn't believe that it caused cancer. Given the state of science then. It wasn't as you see it's a statement of belief not a science driven statement based on any science.

Q. It's a statement not only that cigarettes don't cause cancer, but it says they're not injurious to your health.

A. That statements says "that we believe the products that we make are not injurious to health".

Q. And that was after Dr. Teague had written that long report, found all those references to cancer in skin painting and references to carcinogens in cigarettes and references indicating that 94 percent of all people that had lung cancer were smokers. And references that the data was so uniform in the study that one had to reach the same conclusions from them. And references that

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cigarettes were found to be a substantial cause of cancer. It was after all that that this was put in the press; is that right?

A. This was dated 1954. Claude Teague's literature survey was 1953.

Q. Then we have 1956 where Dr. Rodgman confirmed the cancer causing agents in the smoke, or Camel tobacco blend; correct?

A. That's not exactly correct. Dr. Rodgman confirmed that there were carcinogenic compounds such as benzo[a]pyrene in cigarette smoke.

Q. And others?

A. And others, of course.

Q. And he said they needed to be taken out.

A. Absolutely.

Q. And he started trying to take them out.

A. Yes. And that was the right thing to do.

Q. And then by 1962 -- let me show you Plaintiff's Exhibit 1660 -- may I approach, Your Honor?

THE COURT: You may.

BY MR. ACOSTA:

Q. This is another Dr. Rodgman record,

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isn't it?
A. I believe this is a draft of a formal report that he ultimately published. But this is one of the earlier drafts. This is not the final report.
MR. ACOSTA: All right. Let me put that up here.
May I publish this, Your Honor?
THE COURT: You may.
BY MR. ACOSTA:
Q. All right. This is entitled "Smoking and Health Problems, a Critical and Objective Appraisal".
So, at that time Reynolds considered, at least through Dr. Rodgman, there to be a problem in smoking and health. Do you agree with that?
A. Well, I don't know, I can read the title, too.
Q. Okay.
A. You read it accurately.
Q. Thank you.
Now, let's go to the -- the bottom of the first page.
It says "during the past two decades cigarette smoke has been the target of a host of studies related it to ill health and particularly to

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lung cancer. The majority of those studies incriminate cigarette smoke from a health viewpoint".

And then it says at the top of page 2. "The evidence, pro and con. The cigarette smoke lung cancer problem has been investigated epidemiologically, pathologically, biologically and chemically. Each discipline has yielded pertinent information".

And for example, under pathological data it states "it has been observed that cigarette smoker's lungs show profound cellular changes which are proportional to cigarette consumption. That flourescent constituents of cigarette smoke are absorbed into respiratory tract cells. Although fluorescence and carcinogenicity are not synonomous. That cigarette smoking -- some of the constituents cause ciliary paralysis. And that cigarette smoke brought to the lungs in cilia free areas and in areas with paralyzed cilia".

And let's go to page 4.

"The evidence to date". This is sort of a summary. Would you agree, doctor, that this is a summary?

A. Yes.

Q. "Obviously, the amount of evidence

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accumulated to indite cigarette smoke as a health hazard is overwhelming. The evidence challenging this indictment is scant".

Did I read that correctly?

A. Yes.

MS. PARKER: Your Honor, excuse me, objection. Rule of completeness. Mr. Acosta has not read other relevant portions of the document. I'll be glad to provide a copy to Your Honor to look at.

THE COURT: Well, what we'll do though, is finish the question, I'll let the witness answer, then we'll take a 15 minute break.

BY MR. ACOSTA:

Q. So it was the opinion of Dr. Rodgman some eight years after the Frank Statement, and ten years before Dr. Senkus wrote Dr. Gori, that the evidence that cigarette smoke was a health hazard is overwhelming; is that correct?

A. Yes.

THE COURT: Ladies and gentlemen, we'll take our 15-minute break.

(Whereupon, the jury was excused for a short recess at 2:55 p.m.)

THE COURT: You're still testifying.

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MR. ACOSTA: Your Honor, on the record I'll be happy to consider something under the rule of completeness if I just knew what it was, what the parameter was.

THE COURT: Just a moment. How much longer? How much longer? Going to finish by four?

MR. ACOSTA: I don't know if I'm going to finish.

THE COURT: That's what I'm trying to find out.

MR. ACOSTA: I don't know. I just don't know. It will be close.

THE COURT: If you're close, I need to know. If you're not close, you know. We can break, but I mean here's the thing --

MR. ACOSTA: I would say I'm not that close. I can see myself going two more hours. It -- I mean to ask. I know, I don't want -- I don't want to put -- I don't want to give anybody the wrong impression so that it -- they don't plan accordingly, but I -- I might finish tomorrow, but I have a feeling that it might be two hours.

THE COURT: You have a witness for

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tomorrow?
MS. PARKER: Yes, Your Honor.
THE COURT: Long, short?
MS. PARKER: Pardon?
THE COURT: Long, short?
MS. PARKER: What I'd like to do is I'd like to complete this witness and like to get the depositions and that's going to be about 45 minutes total to get --
THE COURT: The one Fife, I don't have an issue on that. I don't have an issue on that.
MS. PARKER: I think that's -- I think there was all that.
THE COURT: And the other one I -- I -- I'm ready to rule, but --
MS. PARKER: So we -- Dr. Townsend two hours tomorrow morning?
MR. ACOSTA: Maybe.
THE COURT: Maybe. Here's the thing, I have your redirect and I have jury questions. So I'm just -- you know once Mr. Acosta --
MS. PARKER: Can you tell me if you're going to finish tomorrow? I thought he said two.

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THE COURT: I don't know.
THE BAILIFF: 2.
THE COURT: 2?
THE BAILIFF: 2. She has to be out of here by 2.
THE COURT: Why don't we just work the morning. We'll see if people want to work the morning until 1. We'll just go from 9 to 1, or something like that.
MS. PARKER: Trying to get in touch with the office and see about witness schedules. One witness is a doctor. I have to accommodate his schedule. Can I do that and come back from the break.
THE COURT: Uh-huh. (Indicating affirmatively)
MS. PARKER: Give you some idea. So what are you suggesting, we do Dr. Townsend, and depositions tomorrow morning and start --
THE COURT: I'm just going to go 9 to 1. We'll start the witness. I can start the witness -- I don't know if Townsend's schedule --
MS. PARKER: He can stay until tomorrow, there's no problem.

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THE COURT: How long is your physician witness?
MS. PARKER: Not long. I guess a couple hours probably total.
THE COURT: Yours two hours? Or cross --
MS. PARKER: Total. I would imagine.
MR. ACOSTA: Your witness was who? Which witness?
MS. PARKER: A physician witness. Rosenbach.
MR. ACOSTA: Two hours?
MS. PARKER: That what I'm guessing.
THE COURT: Do you think yeah or nay?
MR. ACOSTA: I -- it's hard for me to imagine what Dr. Rosenbach is going to say. If they do it for two hours then -- there's going to be a lot --
THE COURT: Including you.
MR. ACOSTA: You're including an hour for me?
MS. PARKER: Yes, I'm just guessing.
MR. ACOSTA: I'll do as much with him as she does.
THE COURT: Well, all right. In any

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event, it's fine with me if he's here at 9 so you can get him up and off and then we can finish Townsend after --

MS. PARKER: We have to finish Dr. Townsend so I can get him back.

THE COURT: So we'll do Townsend then you can just tell the doctor if you want to get him here at 10:30, get him here at 10:30.

MS. PARKER: I've given Mr. Acosta notice of two witnesses, there's scheduling issue with the doctor. It may not be the doctor, it may be the other witness that I've told Mr. Acosta.

MR. ACOSTA: The Ph.D?

MS. PARKER: Ph.D.

THE COURT: Who is he? How long is he?

MS. PARKER: He's probably a good three hours on direct.

THE COURT: Well, he'll be here two days. If he came tomorrow he would just be two days. I would suspect there's no way to have a physician come down here, because that's the morning and afternoon.

MS. PARKER: So let me make sure I understand, if I might ask.

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THE COURT: We've got to -- we have a witness at 2.
THE BAILIFF: Around 2.
THE COURT: Why don't we start at 9 and go to 1.
MS. PARKER: Just one midmorning break?
THE COURT: We'll, take a couple of breaks. Couple of 15 minutes breaks.
MS. PARKER: Then we'll stop for the day?
THE COURT: Then we'll be done for the day. Let's do that, that way -- just -- just -- just make sure nobody's got some sort of dietary reason to have to stop.
THE BAILIFF: Okay.
MS. PARKER: Here's our --
THE COURT: Look, just you all do that. I'm going to take a break. Generally rule these are all exhibits, so on a rule of completeness normally on both sides of the coin, I'll just error on the side of publishing as long as it's from the document that's being presented. Just so --
MR. ACOSTA: Yes, sir. Where I have a problem is when -- when I'm trying to just

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focus on a certain part and ask a question, then I end up having to read the whole thing, you lose your whole train of thought.

MS. PARKER: You read half the sentence.

THE COURT: You can come back to your question.

MR. ACOSTA: I understand.

THE COURT: You get the same thing.

MR. ACOSTA: Okay.

THE COURT: All right.

MR. ACOSTA: Thank you, Judge.

THE COURT: We will be in recess.

MR. ACOSTA: We got 15 minutes? Until a quarter after?

THE COURT: 15 minutes, quarter after.

(Thereupon, a recess was had from 3:03 p.m. until 3:15 p.m.)

THE BAILIFF: All rise. Civil court is now back in session.

THE COURT: You may -- do you all have that worked out?

MR. ACOSTA: Yes, Your Honor.

THE COURT: Okay. Go ahead and get the jury.

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(Whereupon, the jury returned at 3:17 p.m.)

THE BAILIFF: All rise.

THE COURT: You may be seated.

Mr. Acosta, you may continue.

MR. ACOSTA: May it please the Court. At this time, I would like to further publish on the request of defendant --

THE COURT: Very good.

MR. ACOSTA: -- from -- I need to read the whole paragraph.

(Pause.)

"The statistical data from the smoking and health studies are almost universally accepted. After more than ten years, criticisms of the studies have been reduced to the dicta a statistical study cannot prove a cause and effect relationship between two factors."

Page 3, first paragraph:

"Contradictory evidence indicates that the above-described cellular changes can be caused by respiratory diseases and other illnesses; that these changes occurred to a degree in infants in non-smokers, in the windpipes of

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smokers, although cancer of the windpipe is rare; and in residents of areas of extreme air pollution, and that ciliary paralysis can be caused by air pollutants like industrial and automobile exhaust gases. Also, it is not known whether such changed cells ever become cancerous."

I'm going to read from the interpretation of the evidence on page 4.

"After reviewing this evidence, governmental health agencies and medical societies throughout the world have concluded that a cause and effect relationship exists between cigarette smoke and lung cancer.

"It is predicted that the recently appointed Surgeon General's advisory committee on smoking and health will reach the same conclusion."

This is from Dr. Rodgman's report dated 1962, Exhibit 1660.

BY MR. ACOSTA:

Q. Now, it's true, Dr. Townsend, that in 1964, the Surgeon General of the United States did, in fact, conclude that cigarette smoking was a cause of cancer in man?

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A. Yes.
Q. Lung cancer?
A. Yes, he did conclude that.
Q. And just a moment ago, I just read something about statistical studies. You would agree, Dr. Townsend, that back in 1953 the epidemiologic studies -- these are statistical studies for purposes of our definition of "epidemiology." Would you agree with that, the epidemiological studies are essentially statistical-type studies?
A. Yes.
Q. That the epidemiology from the early '50s was clear, and within Reynolds you saw an acceptance of that epidemiology as demonstrating that smoking was a risk?
A. In a general sense, yes.
Q. But even after the Surgeon General's report in 1969 -- and I'm referring to Plaintiffs' Exhibit 1605, the president of Reynolds -- may I approach, Your Honor?
THE COURT: You may.
BY MR. ACOSTA:
Q. -- the president of Reynolds wrote its stockholders -- and if I might publish this,

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Your Honor.

MS. PARKER: Your Honor, just for the record, what was admitted was Version 1605A.

MR. ACOSTA: A and B were admitted, and I'm referring to A.

THE COURT: 1605A?

MR. ACOSTA: Yes, sir.

THE COURT: You may publish 1605A.

MR. ACOSTA: I turned this off during the break. I'm sorry.

This is dated May 28th, 1969.

Now, the president of Reynolds at that time was Mr. Galloway? Does that -- is that correct?

A. I believe you may be right, yes.

Q. And was he a mister or a doctor?

A. Well, I'm not entirely certain.

Q. We'll call him "Mr. Galloway. He wrote the stockholders, and he said, "We believe that you will find the enclosed booklet, The Cigarette Controversy, Eight Questions and Answers prepared by the Tobacco Institute both interesting and enlightening.

Now, Reynolds was a member of the Tobacco Institute, wasn't it?

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A. Yes.
Q. And the Tobacco Institute was a trade association that provided services, let's say, to Reynolds and other cigarette companies?
A. I think the Tobacco Institute really was a public relations or -- yeah, a public relations trade association.
Q. Okay. And at the bottom of this letter, Mr. Galloway says, "It is our hope that as a concerned citizen and stockholder you will inform other opinion leaders in your community and state of the facts brought out in the Tobacco Institute's booklet and of the cooperative program being sponsored by the Department of Health, Education and Welfare to determine once and for all the relationship, if any, between smoking and health."
And then I'm going to publish what's been previously marked as Plaintiffs' 1605B, a publication -- whoops -- from the Tobacco Institute called The Cigarette Controversy, Eight Questions and Answers. You see that matches up with the first paragraph of his letter as the attachment, Eight Questions and Answers.
The preface states, "For many adults -- adults, cigarette smoking is one of life's pleasures.

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Does it cause illness, even death? Answer: No one knows."

Were you aware that that was the position of Reynolds through the public relations of the Tobacco Institute in 1969?

A. I have seen this document before, and I'm aware that the Tobacco Institute itself, in fact, published this.

Q. Now, earlier you mentioned something about a study that would be important, and that had to do with causing cancer in animals through inhalation. Do you remember saying something along those lines just before we took our break?

A. What I said was that an animal model does not exist in which animals inhaling smoke get lung tumors in a reproducible fashion.

Q. Okay.

I'll go off screen so I can find this.

You're aware, aren't you, Dr. Townsend, that back in late 1969 or 1970, that Dr. Oscar Auerbach, a pathologist at a medical school in New Jersey, caused beagle dogs to inhale cigarette smoke? Were you aware of that?

A. I'm aware that Dr. Auerbach conducted a study with beagles. I understand that there were

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some questions about his study because -- and again, this is not my area of expertise, but I do understand that the mode of administration may have influenced the results.

Q. All right. Well, let me show you what's been previously admitted into evidence as Plaintiffs' Exhibit 1423. This is a Philip Morris document. I'll read from it.

"One dog, which was an inveterate smoker, was placed in a stall to demonstrate how the animal smoked. We used the University of Kentucky reference cigarette."

What is a University of Kentucky reference cigarette?

A. That's a cigarette that is a consistent cigarette. In fact, I referred to it in my direct testimony as a Kentucky 1R4 -- well, the one I used was a 1R4F. It's a reference cigarette that scientists can use that's the same from year to year, because commercial cigarettes change from year to year as the crop -- as the tobacco crop changes. There can be some small changes. So, this is a very stable controlled cigarette for experimental purposes.

Q. Thank you.

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And it says that -- whoops. There we go.

I'm sorry. I didn't realize that wasn't up, and it says, "The dogs's handler, Mr. David Kirman, recognized the cigarette to be stronger than the brand they were using, and the behavior of the dog showed that he, too, was not used to this kind of smoke. The lighting puff was not given to the dog but was made by the pump attached to the cigarette holder. Thereafter, the dog did his own smoking. Counting the puffs the dog took and also looking at the records, it was obvious that the animal took between 20 to 30 shallow ones per cigarette. The amount of smoke could be regulated by the attendant by pinching off the tube leading to the cigarette and to the tracheostomy tube. During the demonstration, Mr. Kirman did this when the dog became cyanotic, very restless, and salivated excessively.

"During the smoking period, which lasted eight to ten minutes, smoke poured out of the dog's mouth and nose. There were moments when the animal was in obvious distress.

"Mr. Kirman states that there were 40 dogs still smoking, and that the tests will continue.

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"Judging the temperature of the smoke by feeling the tube leading from the cigarette to the hole in the trachea, I would say it was no higher than ambient.

"Dr. Auerbach showed me photomicrographs."

You're familiar with what a photomicrograph is, are you not, Dr. Townsend?

A. Yes.

Q. "It's a picture of a microscopic slide that usually made in an 8 by 10 color format?"

A. It can be different sizes, yes.

Q. "Of what looked to my non-expert eye as typical invasive carcinoma. He read me a report from Dr. John Berg, NCI, that would be the National Cancer Institute as you understand it," wouldn't it, Doctor?

A. Yes.

Q. "Which corroborates this diagnosis. Dr. Auerbach showed me several notations in which Neilson, veterinary pathologist, agrees with Auerbach's readings of slides.

The manuscript which had been read before a special meeting of the American Cancer Society has been submitted for publication. Dr. Auerbach did not wish to reveal the name of the

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journal. As a fair well remark, Dr. Auerbach wanted it known that he welcomes any bona fide scientist who wants to visit his laboratory to see what he is doing and how he is doing it. He says he has nothing to hide.

Judging from my reading of a copy of the talk given to the American Cancer Society and from what I saw at the VA Hospital in East Orange, New Jersey, I would say that the experiment is a crude one but effective in that carcinoma in dogs has been produced.

I am not an expert enough to distinguish between these early carcinomas, pulmonary adenomatosis, carcinoma in situ, et cetera. This I leave to the expert pathologist. Naturally the exposure could be refined so that the characteristics of the smoke the dogs were getting could be analyzed chemically.

Also modifications of the smoking technique could be made that would more closely reproduce the human exposure. But this is only a quibble. The crux of the situation is whether there is general agreement by qualified pathologists that carcinomas, squamous cell carcinoma has indeed been produced. And even if the cancer production is

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invalidated the obvious emphysema produced cannot be denied."

Were you aware of those findings, Doctor?

A. I'm not familiar with the details of this, no.

Q. Now, you are familiar, however, with Reynolds efforts at doing animal studies?

A. I'm familiar with many of the efforts, not all of them.

Q. I think on one of your boards you mention that Reynolds did some of its own animal studies?

A. We currently do quite a few animal studies. In fact, even today we're doing basic research to try to define an animal inhalation model because that's real important for comparing cigarettes and also for helping to show what in cigarette smoke may be responsible for the smoking and health problem.

Q. And in fact, as I believe you indicated before we took our break that kind of animal study that would show cancer in animal, perhaps like a beagle would be important proof of the cause of cancer?

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A. I think if the scientific community agreed that there was a reproducible animal model that would be a major step forward.
Q. And you mentioned earlier in your testimony, Dr. Wynder's animal study of -- was it 1953 or '54?
A. Yes.
Q. And then it was thereafter that Reynolds started trying to reduce the risks, correct?
A. Yes.
Q. But Reynolds didn't do an animal study until the 1980s, did it?
A. I don't think that's correctly at all. We established in-house capability to do it in the '80s. We had contracted animal studies out, particularly skin painting studies out before.
Q. All right. The first time that Reynolds did animal studies in-house was in the 1980s?
A. I believe that's correct. I'm talking about skin painting studies specifically. We had done animal studies before that of a different nature. We had contracted out quite a lot of animal studies including mouse skin painting to contract laboratories before the '80s.

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Q. Well, actually Reynolds in the late 1960s, was trying to develop a smoking machine, wasn't it?
A. Yes. And Reynolds -- and Reynolds was also doing experiments with animals in the '60s as well, but not skin painting experiments.
Q. They called it the mouse house, didn't they?
A. Yes.
Q. Reynolds?
A. Yes.
Q. And when Reynolds produced emphysema in animals, it shout down the mouse house; didn't they?
A. Absolutely not, that's complete wrong interpretation of the actual facts.
Q. Well, is Reynolds interpretation then at least that it did not make any conclusive findings?
A. Let me -- if you want to know the facts I'm be glad to tell you the story, but there were no conclusive findings from the animal studies, particularly the one that you're referring to in the mouse house. Yes, we were trying to develop analytical -- or biological methods that we could compare cigarettes.

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Q. But in any event, the first animal studies that Reynolds did to follow up on Wynder's studies were done in the 1980s in-house?
A. In-house. And again we contracted a number of studies with experts in contract laboratories that had the capabilities and had the expertise to reproducibly perform mouse skin painting studies. We currently have that expertise in-house.
Q. And the studies that you're referring to were those done through the Tobacco Industry Research Committee?
A. Some were, but many of them were done under contract from Reynolds directly for specific purposes.
Q. And I take it that those studies then were not successful in demonstrating that cigarettes caused cancer in those animals?
A. Skin painting experiments?
Q. Yeah.
A. Showed tumor production when cigarette tar is applied.
Q. And Reynolds used this to try to make one cigarette safer than another?
A. We used that for stewardship and also for guidance.

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Q. Guidance in trying to reduce the risk?
A. Yes.
Q. Because that's what Reynolds was trying to do back in the '60s and '70s, was an attempt to -- to come up with a lower tar, but maybe medium nicotine -- nicotine cigarette, remember?
A. Yes, but that's only one execution of what might be a reduced risk cigarette. Removing constituents from smoke is another approach, a different approach than making a immediate tar -- immediate nicotine low tar cigarette. I think you've got these quite confused.
Q. What -- what -- how have we gotten them confused, Doctor?
A. Because I said there are multiple approaches to trying to develop what might be a safer cigarette. If you want me to go back, I'll be happy to. One is to change the nature of the tar chemically, either by selective reduction by reducing or eliminating compounds out of the tar. You're changing it chemically, you're changing the nature of tar.
Another way is to change the exposure that one gets to all of these constituents by virtue of general reduction, reducing the total amount of

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tar that is presented from the cigarette. And yet another way, very different than the first two was the Russell type approach or the one that was also suggested by Gori and NCI, and that is keep -- keep the nicotine level high, and reduce the tar to the lowest possible level. Those are different approaches to developing what may be a safer cigarette.

Q. And isn't it fair to say that NCI and some of the other groups that were looking at this low tar concept abandoned it in the late 19 -- in the 1970s, early 1980s?

A. Well, again, the NCI-TWG was not just working on low tar, medium nicotine. It in fact, I think you missed the point of my direct testimony in this. The NCI-TWG in fact was doing detailed experiments to try to discover which specific cigarette design techniques were useful in reducing the risks.

For example, the reconstituted tobacco that we talked about, the NCI showed through mouse skin painting studies that smoke from that reconstituted tobacco was less tumorigenic, it generated less tumors, fewer tumors on the backs of mice.

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Q. Let's talk about that?
A. So that -- that was essentially basic research to help guide us in designing safer cigarettes. That was separate from the suggestion from the NCI-TWG that a safer cigarette might also be one that has medium nicotine, low tar. Separate suggestion from the bulk of what NCI-TWG was doing.
Q. Isn't it true that if you reduce the tar and nicotine by 50 percent you only reduce the risk by 25 percent?
A. I think that's -- you're probably referring to Tang and Wald, an epidemiology study that was -- that was conducted in the UK.
Q. If you're asking me, I'm referring to your prior testimony in Jones?
A. Well, I didn't recall that.
Q. Is that accurate? You reduce the tar and nicotine by half but you only reduce the risk by a quarter?
A. In the Tang and Wald article that was the conclusion. Tang and Wald in the UK actually did the epidemiology study with smokers. And they compared smokers who smoked high tar cigarettes at 30 milligrams per cigarette. Compared those to smoker who smoked low tar cigarettes or what they

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considered low tar at 15. In the United States that's still considered a high tar cigarette at 15. But 30 versus 15.

So, that's a 50 percent reduction in tar from the cigarette. What Tang and Wald found in the UK was they found a 25 percent reduction in lung cancer mortality for those two -- those two groups of smokers. And what they concluded was there was a real significant reduction in risk. It wasn't as much as the reduction in tar, but it was a statistically significant and -- and meaningful reduction and risk of lung cancer mortality.

Q. So, cutting the tar from 30 to 15, just increases your -- just decreases the risk by 25 percent?

A. Yes.

Q. And what happened was that NCI and the groups that, for example, that group that Dr. Senkus worked with, they abandoned further work on a -- on this low tar, low nicotine cigarette concept.

And I believe you testified it was for political reasons.

A. The effort was abandoned for political reasons, yes. Purely political.

Q. Those reasons were that another

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alternative to reducing the risk, in fact a better alternative was to quit smoking altogether; is that correct?

A. If one is concerned about the risks of smoking, the best alternative is to quit smoking because that reduces the risks big time.

Q. Now --

A. Excuse me, please. So if one wants to completely reduce the risks of smoking, stop smoking.

The fact that the NCI, TWG which was the substance of your question was stopped, was purely political and it was because the government changed to a policy of smoking cessation. The only acceptable outcome -- the only acceptable end point is for people to completely stop smoking. And for people to continue smoking with -- with a push to try to develop safer cigarettes was not consistent with what the government wanted to see.

Q. And it wouldn't be considered -- it wouldn't be compatible with Reynolds' business interests either, would it?

A. For people to stop smoking?

Q. Correct.

A. I think that's fair to say.

Q. People stop smoking, Reynolds loses

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income, correct?
A. I think that's fair to say.
Q. Now, it's also true, isn't it, that with regard to emphysema -- let me ask you this, COPD and emphysema are somewhat interchangeable, aren't they?
A. Pretty much. COPD is actually a broader term. Emphysema is one type of COPD.
Q. Emphysema being a type of COPD falls under the umbrella of COPD, fair to say?
A. Yes.
Q. And isn't it true that with respect to COPD, that even considering the low tar, low nicotine cigarette, that it was unknown in 1994?
A. '94.
Q. Or '96, that that reduced the risk at all for developing emphysema; is that correct?
A. That -- that was a conclusion from some of the participants at the NCI, FTC tar meeting in 1994 based on some of the epidemiology.
Q. So, in other words, reducing the tar and nicotine in the cigarette doesn't make it any less risky for getting emphysema, does it?
A. I don't think that's the proper conclusion. I think based on the epidemiology, the

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epidemiology is not strong enough to show that there's a difference.

If I were a toxicologist, believing the basic tenant of toxicology that less ought to be better, I would say go into a low tar cigarette ought to reduce my risk of COPD, including emphysema. But certainly, I think the author in that study couldn't conclude that there was reduction based on the epidemiology that was available at hand.

Q. And this was the symposium, the National Institute of Health, the National Cancer Institute which you attended?

A. Yes.

Q. And their conclusion was you can take all this stuff out of cigarette but we can't tell you that it's going to reduce your risk for emphysema?

A. Yes, they couldn't tell you that because the epidemiology wasn't strong enough to draw that conclusion.

Q. And with regard --

A. And in fact one of conclusions or one of the points of discussions in that whole meeting was that there really isn't a whole lot of epidemiology going on now to compare people who are smoking now, the light cigarettes and the ultra low

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cigarette products to in fact show that there are differences. There's very little funding for that type of epidemiological research.

Q. Well, one of the issues with the cigarette is that there's a tar phase, a nicotine phase and a gas phase, in the cigarette, right?

A. No.

Q. Isn't gas part of what comes out of the cigarette when you light it and smoke it?

A. There are two phases, there's the gas phase and a particulate phase.

Q. Okay.

A. The nicotine happens to reside in both the particulate and the gas phase.

Q. And there are some other things that reside in the gas phase other than nicotine, right?

A. A large -- a large number of constituents present at low levels, yes.

Q. And those are things called phenols and aldehydes and amines and things like that?

A. You're generalizing. There are certainly a number of aldehydes present in the vapor phase. There's some that are present in the particulate phase. There are some phenols that are present in the vapor phase. There's some phenols

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present in the particulate phase.
Q. And when you develop a low tar cigarette or a cigarette with low tar to nicotine ratio those things don't necessarily come out, do they?
A. Yes, they do. You're wrong.
Q. And in the same proportion as the others?
A. Approximately, yes. And if one looks at -- if one looks at both -- if one looks at the total smoke, including the tar phase and the particulate phase through the general techniques that we've developed and put in place in commercial cigarettes you see all of the constituents going down.
Q. Okay.
A. More or less to the same degree. So if you bring the tar level down from 15 to 7 and a half, pretty much all of constituents come down by a factor of -- a factor of a half, or come down to a half of what they were. Regardless of whether they're vapor phase or particulate phase. So that's why we call it general reduction, it hits all the compounds.
Q. Okay. I guess what I'm trying to find out is -- and I didn't ask the question very

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artfully.
When those things are considered -- whatever level they come out of a cigarette at, what the NCI found is you can't tell whether that reduces the risk for emphysema?
A. Well, again that's a slightly different way to say what they said, which was -- my recollection, was that the epidemiology is insufficient to show, to prove, that there's been a reduction in emphysema as a result of tar reduction.
Q. And --
A. Again, there was a lot of discussion about the lack of good epidemiology funding to conduct the types of research that needs to be done.
Q. And for emphysema, that results from destruction of the lung tissue, is that your understanding?
A. Well, again, I'm not a biologist, but I would agree with you, yes.
Q. And you talk about ciliastats, I believe, on your direct testimony, correct?
A. Yes.
Q. Cilia are those little fingers inside your lung, microscopic in size, that bead in a sea of mucus. And move the dust particles up in your mouth

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so you can get rid of them, is that the way it works?
A. In the general sense. It's a major clearing mechanism for the upper respiratory tract.
Q. When you smoke a cigarette it paralyzes or destroys the cilia in the lung; is that true?
A. That was the theory and that's why we undertook identifying ciliastats in smoke and reducing and eliminating them.
Q. Is it a theory or is it a fact?
A. That cigarette smoke paralyze cilia?
Q. Yeah?
A. It's interesting that you ask that because that was the going in hypothesis -- there was a research group in Sweden that actually found that most of the ciliastats in fact are very water soluble. And so they were absorbed in the oral cavity and never made it down to where the cilia are in the first place.
Do I consider the ciliastatic theory as a reasonable theory to identify constituents to reduce? Yes, I do. Because I don't think in spite of that one experiment there hasn't been additional experiments in other laboratories that confirm that -- that there's not any decrement in cilia behavior, or cilia activity, rather, so I think -- I

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think there's more work that needs to be done, certainly.

Q. Now, irrespective of this so-called ciliastats, just the cigarette smoke in general, is it a fact or not that it damages the cilia in the lung when you smoke?

A. Well, I thought that's what I was trying to answer. The ciliastats are primarily absorbed in the oral cavity and never get to where the cilia are. Then it's not clear to me that you've in fact significantly affected the action of the cilia.

The second thing is that some studies with animals have suggested that cilia behavior or activity is reversible even if -- if you expose them to ciliastats they can under some circumstances reverse their activity and come back to their normal function. But again, I'll caution you, you're pretty much outside of my area of expertise.

Q. Well, in other words, you're telling me that you haven't been able to determine that the ciliastats that you try to reduce are doing anything to will reduce what damage there is, if any, to the cilia in the lung?

A. What I'm saying is it's an unclear

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picture experimentally to what extent the ciliastasis issue is -- is a significant issue in exposure of tar to the lung, the clearance mechanism.

It's certainly -- and to be fair, the approach that we've taken at Reynolds is to assume that that hypothesis in fact is right. That the ciliastats in smoke do make it to the -- to the cilia, to the area of the cilia, that they do stop the action of the cilia, and then our job is to reduce or eliminate those.

Q. Okay.

A. I'm just saying it's an unclear scientific picture. Is it the right thing to do to reduce those constituents in smoke? Yes.

Q. Does Reynolds take the position -- I know what you said about the study in Sweden or Norway, wherever it was, does Reynolds take the position that ciliastats are compounds in smoke that kill cilia?

A. That kill cilia?

Q. Yeah.

A. We've taken the position, again, assuming that hypothesis, we've taken the position that ciliastats are compounds that stop the action of cilia.

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I don't recall hearing a scientist or anyone at Reynolds using the "word kill cilia," but it certainly can. If it makes it to where the cilia are, it could stop the action of cilia. And I believe there is some evidence that that can be a reversible process.

Q. Can I show you your testimony?

A. Please.

MR. ACOSTA: May I approach, Your Honor?

THE COURT: You may.

THE WITNESS: And who is this?

MR. ACOSTA: You.

MS. PARKER: Your Honor, could I get some identification.

MR. ACOSTA: I will before I ask him a question.

THE WITNESS: Okay. Do you want me to read this?

BY MR. ACOSTA:

Q. No, I don't actually, but I want to give her the page and line number first before I ask you a question, if that will be all right?

A. Sure.

Q. I believe it's 9/25 a.m., page 137, at

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line 3 to line 8.

Let me just ask you a question.

A. Sure.

Q. You've indicated in here -- this is -- this is not something within your expertise?

A. Yes --

Q. Right?

A. -- once again.

Q. But the word "kill the cilia" came out of your mouth first?

A. Yes, if that's my testimony, it did.

MR. ACOSTA: Okay.

Just a second, Your Honor, I need to find a document.

THE COURT: Mr. Acosta.

MS. PARKER: Your Honor --

MR. ACOSTA: This would be a good resting place if -- if it's appropriate for the Court.

THE COURT: Okay. We'll do that.

Ladies and gentlemen, we're going to conclude for today.

Tomorrow, we're going to go from nine to one. Okay, we'll take a couple of breaks in there, but we'll just -- it will be a nine

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to one day, so you'll have the afternoon free.
A reminder, the case must be tried or heard by you only on the evidence presented during trial in your presence and the presence of the attorneys and in my presence.
You must avoid reading newspaper headlines and articles and any other media reports about this case or any related matter.
So with that, I wish you a good evening and we'll see you tomorrow at 9:00.
(Whereupon, the jury was excused at 3:59 p.m.)
THE COURT: And you are in the middle of your testimony, so don't discuss it with anyone.
All right. Mr. Fuhrman, and Mr. -- who is handling the dep? You are?
MR. DENSON: Depos?
THE COURT: Yes.
Line -- page 13, line 13 to line 20. I'll sustain as to form. The question -- the question asked: What did Mr. Kenyon report? The witness would have no way of knowing that. Nonetheless, you can publish -- the document is in evidence, it can be published.

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Page 14, line 21 through page 15, line 1. I'll sustain that as to form. The question asks about Mr. Kenyon or the agent, and then refers to "he," and I would sustain as to form, because it can ask what the agent did, they can ask what Mr. Kenyon did, but I think the other two questions -- I'm going to allow the two questions around that. So I think that addresses those issues.

So those two questions are sustained, the others are permitted.

MR. FUHRMAN: Yes, sir, and we'll revise the videotape. If we could ask about -- if -- with respect to Ms. Fife, we took Your Honor's --

THE COURT: Right.

MR. FUHRMAN: -- your rulings on what you sustained and we --

THE COURT: Is there anything else on that depo?

MR. DENSON: On Ms. Fife, just the objections that are noted.

THE COURT: Right. Obviously your objections are preserved. So, I've ruled on those objections.

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So, the record is clear, you objected to the inquiry from page 11 through page 15.

MR. DENSON: That's right.

THE COURT: And I've only sustained portions of your objections.

MR. DENSON: That's right.

And my objection was based on it's cumulative and best evidence rule. The documents are in evidence, they speak for themselves.

THE COURT: All right. Very good. So, I've ruled on those two. That will take care of the depositions.

Tomorrow after they leave at 1:00, I'll just need an update from counsel, because I want to get a handle where we are day-wise. We'll also address next week.

I'm sure we will not be here Monday, but Tuesday I'm debating on, depending upon where we are, kind of the presentation. Tuesday I'm debating on.

MR. ACOSTA: I couldn't --

THE COURT: Tuesday we may be in trial next week, but Monday we will not be, but Tuesday I'm debating on, so -- or find out

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where we are, or how much time we have so I can kind of gauge where we are in the midst of the trial. And I want to give the jury some kind of an idea on Thursday where we are.

Anything further?

MS. PARKER: Yes, Your Honor, one other thing. My understanding is we're going to stop early tomorrow because one of the juror's schedules.

THE COURT: Correct.

MS. PARKER: If Your Honor is available, we have some more documents that we need to have admitted so we can publish to the jury.

Would tomorrow afternoon be a good time for us to argue those?

THE COURT: We can undertake -- we'll take a break, you know, like an hour break for lunch.

MS. PARKER: That's great.

THE COURT: But then we can come back and do that, but I want to get a handle on the length of trial --

MS. PARKER: Right.

THE COURT: -- first, and then we can

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go into other issues either side has.
MS. PARKER: That's fine, thank you, Your Honor.
THE COURT: And we'll address the -- Mr. Denson, I just want to -- and Ms. Parker -- anybody else, just come up here, I just want to show you one thing.
On the -- you have a memo -- responsive memo that addressed the test that is outlined at 4214.
MR. DENSON: Right.
THE COURT: I was asking questions, I was really referring to the test outlining 4215. And here's my question, are you all seeking this charge as part of your strict liability claim, or not?
MS. PARKER: We are, Your Honor.
THE COURT: You are?
MS. PARKER: Yes, Your Honor.
THE COURT: Okay.
MS. PARKER: That's not only what was given in part. Florida Supreme Court decision --
THE COURT: I understand, but here's the question is -- the question -- here's --

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I'll tell what you what the question is: On this charge, on 4215, number 3, whether plaintiff would have used -- and this is the strict liability jury instruction given in Carter, so the record is clear -- whether plaintiff would have used the product employing the alternate design instead of the product he did smoke.

He -- the evidence is -- are you getting all this?

The evidence is -- there's evidence that he switched from Camel to Salem. And it was a different design. I don't think there's any evidence to say that he did it for health reasons. The evidence seems to suggest he didn't explore other types of designs. So -- so, my question on whether you've met this element, if I read into this an intent to switch designs for health reasons, I'm not sure you've reached -- you've met that element, but if I just read this element as would he have used alternate designs, well, there's -- he did switch from Camel to Salem which was an alternate design.

So, there is evidence to suggest that,

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so that -- so that's -- I'll just address this tomorrow but --

MS. PARKER: Your Honor --

THE COURT: -- you're asking for this charge anyway.

MS. PARKER: Right. Your Honor, just very briefly, the evidence has to be it's a feasible, safer alternative design, not just that he switched.

THE COURT: Right. Right.

MS. PARKER: And the third element there is zero evidence of, zero --

THE COURT: The third element being?

MS. PARKER: The second -- I guess the second part.

THE COURT: Yeah, well, there's other issues --

MS. PARKER: If he used -- then the injuries would have been avoided. There's no evidence --

THE COURT: Well --

MR. ACOSTA: Could I address the way they're approaching this? It's wrong.

THE COURT: All I'm doing now is I'm saying -- so, tomorrow I'm going to find out

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specifically, I'm going to ask on that element.

MR. DENSON: Okay.

THE COURT: And I want to inquire of you. Then we can go into the rest of it.

MR. DENSON: I think that if you look at the -- obviously, the West versus Caterpillar case which has our burden and what the elements are for a products claim, and you compare it with the Illinois case that I gave you, the auto case, you'll see that that's not the element or the burden for us to show, but I think when you read those cases it becomes real clear how -- how that all plays out as far as directed verdict and our burden.

THE COURT: That's -- I mean, the standard of directed verdict is significantly different than --

MR. ACOSTA: Judge --

THE COURT: -- what portions --

MR. ACOSTA: What I think is actually the issue here is let's say that Reynolds came forward and said, well, we have this alternative design, here it is. And Mr. Kenyon didn't try it, that's a different

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issue, but that's -- it's getting confused.
THE COURT: I'm not -- in any event, I'll talk about it all tomorrow with you. Let's -- because I need to be across the street.
Okay. We'll be in recess until 9:00 tomorrow.
Is there anything further today?
MR. ACOSTA: Not from plaintiff, Your Honor.
THE COURT: Anything further?
MR. FUHRMAN: No, sir.
MS. PARKER: Thank you, Your Honor.
THE COURT: We're in recess.
THE BAILIFF: Court is in recess until tomorrow at 9:00.
(Whereupon, court was recessed at 4:07 p.m.)

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COURT REPORTER'S CERTIFICATE

STATE OF FLORIDA)
CIRCUIT OF HILLSBOROUGH)

I, MARY ELIZABETH BLAZER, Court Reporter for the 13th Judicial Circuit of the State of Florida, in and for Hillsborough County,

DO HEREBY CERTIFY that I was authorized to and did report in shorthand the proceedings and evidence in the above-styled cause, as stated in the caption hereto, and that the foregoing pages numbered 2005 to 2110, inclusive, constitute a true and correct transcription of my shorthand report of said proceedings and evidence.

Dated this 27th day of November, 2001.

_____
Mary Elizabeth Blazer, RPR

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